

# State of South Dakota

## EIGHTY-EIGHTH SESSION LEGISLATIVE ASSEMBLY, 2013

309U0441

### HOUSE ENGROSSED NO. **HB 1135** - 02/13/2013

Introduced by: Representatives Hoffman, Craig, Cronin, Duvall, Feickert, Gosch, Greenfield, Kopp, May, Nelson, Olson (Betty), Qualm, Schaefer, Schoenfish, and Schrempp and Senators Rhoden, Begalka, Bradford, Brown, Ewing, Frerichs, Lucas, Maher, Monroe, Novstrup (Al), Rampelberg, and Vehle

1 FOR AN ACT ENTITLED, An Act to regulate access to and use of public waters on public and  
2 private property.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. The Legislature finds:

- 5 (1) The South Dakota Constitution's specific private property protections, including  
6 recognition of the inherent right of acquiring and protecting property and the  
7 prohibition on taking or damaging private property for public use without just  
8 compensation, protect against government's broad recognition or grant of a public  
9 recreation easement to access or use public water on private property;
- 10 (2) General statutory provisions declaring public ownership of water and recognizing  
11 existing rights of use are insufficient to overcome the specific constitutional  
12 protections for private property and do not justify inviting widespread unauthorized  
13 invasion of private property for recreation purposes where public access has never  
14 existed or has not existed for a sufficient period and under the conditions required to



support recognition under this Act;

(3) Whether, or to what extent, a public easement exists for recreational use of public waters on private property is uncertain after judicial decision in the case of *Parks v. Cooper*, 2004 SD 27. This decision held that the Legislature, rather than the courts, has an obligation to determine the extent of the public's right to use nonmeandered bodies of water held in trust for the public by the state, and did not address the constitutional prohibition on taking or damaging private property without just compensation;

(4) It is necessary to foster restoration of accommodation existing between recreational users and private property owners and recognize adverse use as a constitutionally sound and manageable basis for establishing a limited right of public recreational access on private property in accordance with this chapter.

Section 2. Terms used in this Act mean:

(1) "Department," the Department of Game, Fish and Parks;

(2) "Private property to which access is restricted," privately-owned real property in which fishing, hunting, or trapping is prohibited pursuant to § 41-9-1. The term includes privately-owned real property that lies beneath nonmeandered public waters, in which the owner or any other person legally in possession of the property posts conspicuous markings that are plainly visible and understandable to the public restricting or prohibiting recreational use of the water overlying the private property at all public roadways, public rights-of-way, or other lawful points of public access that abut the public water on private property;

(3) "Public access area," the limited part of privately-owned property that:

(a) Lies beneath or within three feet of a public water or that is the most direct,

1 least invasive, and closest means of portage around an obstruction in a public  
2 water;

3 (b) Is open to public recreational access; and

4 (c) Can be accessed from an adjoining public access area or public right-of-way;

5 (4) "Public recreational access," the right to engage in recreational access established in  
6 accordance with section 4 of this Act;

7 (5) "Public water," water as described in § 46-1-3. Recreational access to public water  
8 does not include water flowing or collecting on private property in a manmade  
9 irrigation canal, irrigation ditch, or impoundment or reservoir constructed outside a  
10 natural or realigned channel;

11 (6) "Recreational access," the use of public water, and the touching of a public access  
12 area incidental to the use of the public water, for floating, fishing, or waterfowl  
13 hunting conducted in compliance with applicable law or rule.

14 Section 3. The public may use a public water for recreational activity to the extent the  
15 recreational activity is not otherwise prohibited by law, unless the public water is on private  
16 property to which access is restricted. A person may access and use a public water on private  
17 property to which access is restricted for any lawful purpose with the private property owner's  
18 permission. A person may not access or use a public water on private property for recreational  
19 activity if the private property is property to which access is restricted, unless public recreational  
20 access is established under section 4 of this Act.

21 Section 4. The following principles, requirements, and restrictions apply to public  
22 recreational access to public water on private property:

23 (1) Public recreational access is established if:

24 (a) The nonmeandered public water overlying private property has been used by

1           the public for recreational access for a period of at least twenty-one  
2           consecutive years; and

3           (b)   The public use has been:

4                   (i)   Continuous during the season conducive to the recreational access;

5                   (ii)   Open and notorious;

6                   (iii)   Adverse; and

7                   (iv)   Without interruption;

8           (2)   The permissive use of a public water on private property granted by the owner is not  
9           an adverse use;

10          (3)   A property owner's overt act intended to interrupt uninvited recreational access is a  
11          sufficient interruption to restart any period of use that may have already begun under  
12          subdivision (1) if the evidence, taken as a whole, shows that the act came to the  
13          attention of the public or resulted in actual interruption. If an overt act is established  
14          in a final judgment to have interrupted recreational access, no other person may  
15          challenge the existence of the overt act in a subsequent action;

16          (4)   The extent and nature of the public recreational access permitted under subdivision  
17          (1) is determined by the nature of the historical recreational access during the  
18          twenty-one consecutive years required under subdivision (1);

19          (5)   If a public water is a lake, pond, or reservoir located on private property, any portion  
20          that has been developed or protected for private hunting is not subject to public  
21          recreational access even though the remainder of the public water qualifies for public  
22          recreational access under this section;

23          (6)   A right of public recreational access on private property, established in accordance  
24          with this section, may not be closed without authorization of other law.

1       Section 5. The following principles, requirements, and restrictions apply to actions to  
2 determine the existence of public recreational access to public waters on private land:

3       (1) A person, including the department, may file a quiet title action in accordance with  
4 chapter 21-41 to obtain a judicial declaration of the existence of a right to public  
5 recreational access under section 4 of this Act. The department may intervene in a  
6 quiet title action filed in accordance with this subdivision. The department may not  
7 be compelled to file a quiet title action or join a quiet title action filed by another  
8 person;

9       (2) The claimant in a quiet title action under subdivision (1) shall name each property  
10 owner of record as a party and notify the department of the suit by certified mail no  
11 later than twenty days after the day on which the quiet title action is filed;

12       (3) Within five days after receiving notice in accordance with subdivision (2), the  
13 department shall post notice of a quiet title action under this section on its internet  
14 website;

15       (4) A quiet title action under this section shall be commenced within four years after the  
16 day on which a period of prescriptive use ceases;

17       (5) The burden of proof for a quiet title action under this section is on the claimant to  
18 prove the existence of a right to public recreational access under section 4 of this Act  
19 by clear and convincing evidence;

20       (6) A quiet title action under this section is limited to a declaration concerning the  
21 property and property owner joined in the action;

22       (7) Multiple claimants and multiple property owners may be included in a quiet title  
23 action concerning public water common to the property owners. In a case with  
24 multiple property owners, the court shall make a separate finding concerning each

1 property owner included in the action;

2 (8) A final judgment on the merits that a piece of private property is not subject to public  
3 recreational access is binding and may not be challenged in subsequent litigation;

4 (9) The court may award attorney fees and costs in an action under this section if the  
5 court finds that the losing party's arguments lack a reasonable basis in law or fact.

6 Section 6. The following principles, requirements, and restrictions apply to actions for  
7 injunctive relief relating to recreational use of public waters on private land:

8 (1) The owner of private property may obtain injunctive relief against a person who,  
9 without permission, enters, remains, or persists in an effort to enter or remain on the  
10 owner's property for recreational use of public water other than use in accordance  
11 with section 4 of this Act, when effective;

12 (2) An injunction under this section is in addition to any remedy for trespass;

13 (3) The existence of an easement under section 4 of this Act is a defense in an action for  
14 injunctive relief under this section or a claim of trespass under other law;

15 (4) If a person against whom an injunction is sought, or a person charged with trespass,  
16 establishes by clear and convincing evidence the existence of an easement for defense  
17 purposes, as described in subdivision (3), the establishment of the existence of the  
18 easement applies only to the defense and does not constitute a judicial declaration of  
19 the easement's existence for another purpose;

20 (5) If an owner obtains an injunction against a person under this section, the injunction  
21 does not serve as a declaration that there is no public easement on the owner's  
22 property;

23 (6) The court may award attorney fees and costs in an action under this section if the  
24 court finds that the losing party's arguments lack a reasonable basis in law or fact.

1       Section 7. Nothing in this Act affects the right of the public to use public water for public  
2 recreational access, including the touching of the bed beneath the public water, if the bed  
3 beneath the public water is public property or the bed beneath the public water is private  
4 property to which access is not restricted. A person using a public water for public recreational  
5 access is subject to any other restriction lawfully placed on the use of the public water by a  
6 governmental entity with authority to restrict the use of the public water. Nothing in this Act  
7 limits or enlarges any right granted by express easement. When leaving a public access area, a  
8 person shall remove any refuse or tangible personal property the person brought into the public  
9 access area.

10       Section 8. The owner of a public access area adjacent to and lying beneath a public water  
11 may place a fence or obstruction across the public water for agricultural, livestock, or other  
12 lawful purposes. The fence or other obstruction shall comply with any applicable federal, state,  
13 or local law and be constructed in a manner that does not create an unreasonably dangerous  
14 condition to the public lawfully using the public water. The owner of a public access area shall  
15 place or allow the placement of a ladder, gate, or other facility allowing portage around a fence  
16 or obstruction if the owner places a fence or obstruction across a public water in accordance  
17 with this section and the water is open to public recreational access by permission or under  
18 section 4 of this Act.

19       Section 9. A property owner or person legally in possession of the private property who  
20 posts conspicuous markings that are plainly visible and understandable to the public restricting  
21 or prohibiting recreational use of the water overlying the private property at all public roadways,  
22 public rights-of-way, or other lawful points of public access that abut the public water on private  
23 property shall file a notice with the department verifying that the area was marked in accordance  
24 with this Act.

1       Section 10. The liability of any landowner owning private land underlying a public water  
2       open to use under section 4 of this Act is limited as provided for in §§ 20-9-12 to 20-9-18,  
3       inclusive.

4       Section 11. That § 46-1-3 be amended to read as follows:

5       46-1-3. It is hereby declared that all water within the state is the property of the people of  
6       the state, but the right to the use of water may be acquired by appropriation as provided by law.  
7       The declaration of public ownership of water in this section does not create or recognize an  
8       easement for public recreational use on private property. The Legislature shall govern the use  
9       of public water for beneficial purposes, as limited by constitutional protections for private  
10      property. The right of the public to use public water for recreational purposes is governed by this  
11      Act.

12      Section 12. Nothing in this Act limits or restricts the public's right to recreational use of any  
13      river designated as navigable pursuant to federal law, stream defined as navigable by § 43-17-  
14      34, or any meandered lake.

15      Section 13. On any meandered lake, the provisions of this Act are subject to § 43-17-29.